

IN THE SUPREME COURT OF MISSOURI

Case No. SC86181

DONNA SNIDER, ASSESSOR FOR PEMISCOT COUNTY, et al.

Appellants,

v.

CASINO AZTAR, et al.,

Respondents.

Appeal from the Circuit Court of Pemiscot County

Case No. 01CV752808

Honorable Fred W. Copeland

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this case under Article V, Section 10 of the Missouri Constitution and Rule 83.04 of the Missouri Rules of Civil Procedure. The action comes to the Court from the Circuit Court of Pemiscot County and involves the judicial review of a decision of the State Tax Commission of Missouri (hereafter “State Tax Commission” or “Commission”) relating to appeals of assessments of real and personal property by Aztar. After denial of their appeals of their assessments by the Pemiscot County Board of Equalization, Aztar sought review by the State Tax Commission. [L.F. 14, 17, 286] Following a hearing on the matter, a hearing officer for the Commission ruled that the properties were overvalued and adopted the valuations proposed by Aztar with one minor exception as relates to the real property which is not material to this appeal. [L.F. 256, 627] Pursuant to the statutory procedures related to such appeals, Donna Snider, Assessor for Pemiscot County, and Pemiscot County filed their application for review of the hearing officer decisions with the Commission itself, [L.F. , 646] which were denied. [L.F. , 654] A timely petition for judicial review was then filed with the Circuit Court of Pemiscot County. [L.F. 1] On judicial review, the trial court affirmed the decisions of the Tax Commission. [L.F. 724] This appeal followed. [L.F. 725] The appeal was originally filed with this Court but transferred to the Missouri Court of Appeals, Southern District on motion of the Respondents. Case No. SC85337. Following opinion of the Missouri Court of Appeals, the Court ordered the appeal transferred here.

STATEMENT OF FACTS

This action involves three separate appeals of real and personal property assessments of property owned by Casino Aztar and Aztar Missouri Gaming. The real property which is the subject of this appeal is separately owned by Casino Aztar, [L.F. 14, 17] while the personal property is separately owned by Aztar Missouri Gaming. [L.F. 286]

Real Property Assessment

Two of the three appeals involved the real property owned by Casino Aztar. [L.F. 14, 17] While the real property is a single tract, it was divided into two tax parcels to accommodate the Assessor's computer system. [L.F. 67] This subdivision of the property for tax purposes is not an issue in this case and the parties and the Commission treated the property as a single tract for purposes of placing a value on it.

The real property owned by Casino Aztar is situated on 37.5 acres located at 770 East Third Street, Caruthersville, Missouri. [L.F. 48, 86] Of the total site, 19.3 acres was unprotected flood plain located outside the Corps of Engineers levee. [L.F. 86, 113, 115] It is operated as the Aztar Casino, a licensed gaming casino. [L.F. 48] The land for the gaming facility was acquired in 1994. [L.F. 171-180] The property was acquired, designed and constructed specifically to function as the land-based facilities for a casino. [L.F. 102] Construction of the facility was completed in 1995 and the casino opened for business around July 1, 1995. [L.F. 118]

The real property consists of the land-based facilities for the Aztar Casino. [L.F. 102] The casino, itself, is located on a boat. [L.F. 76] The improvements to the land

include the Pavilion, two concrete gazebos, an expo center, and ancillary site improvements. [L.F. 86] The Pavilion has an area of approximately 40,000 square feet on two levels, one at ground level and one below. [L.F. 86] Its use includes a restaurant, bar, pool room, common areas and public restrooms on the ground level. [L.F. 102] The lower level is used for executive offices, security office, mechanical rooms, food and beverage storage and preparation, loading docks, employee lounges and employee restrooms. [L.F. 102] In addition to the two gazebos and expo center, the site improvements consist of 872 surface parking spaces for cars, 50 surface parking spots for over-the-road trucks, pole-mounted lights, concrete sidewalks, chain link fencing, and a four acre park with barbecue grills and picnic tables. [L.F. 101] All of the improvements were constructed in 1995. [L.F. 99]

The Assessor had assessed the site at a fair market value of \$11,970,280 and an assessed value of \$3,830,490. [L.F. 14, 17] The property was sub-classified as commercial property. The Board of Equalization of Pemiscot County considered Aztar's request for lower value but determined that the Assessor's value was appropriate. [L.F. 16]

The valuation evidence at hearing consisted of the written appraisal of value prepared by Casino Aztar's appraisal witness, [L.F. 86, *et seq.*], that person's pre-filed written testimony, [L.F. 214, *et seq.*], and the witness' testimony at the hearing before the Commission's hearing officer. [L.F. 50, *et seq.*] The witness' opinion of value of the real estate on January 1, 1999, was \$5,000,000. [L.F. 51, 87] This opinion valued the land and buildings, the gazebos and the site improvements, but excluded the expo center.

[L.F. 51] In the appeals filed by Casino Aztar, it had proposed a value of \$6,000,000 for the property. [L.F. 14, 17]

The testimony of Casino Aztar's valuation witness was consistent on two points throughout. First, the highest and best use for the property was as a gaming casino. [L.F. 51, 63, 65, 78, 99, 129, 219] Second, the property at its highest and best use as a gaming casino was a unique or special use property. [L.F. 62, 63, 68, 73, 76, 104, 124, 126-27, 155, 160]

In determining the highest and best use for the subject property, a study and analysis of all possible uses of the property was conducted. [L.F. 128] The witness took into account that the property was specifically designed for its use as a gaming casino and well-suited for its purpose. [L.F. 102, 104, 122, 124, 143, 145] His conclusion on highest and best use was also bolstered by his conclusion that the property could not be converted to an alternate use, including use as a hotel, mixed use, institutional use, or retail use. [L.F. 126-27, 129]

The witness utilized three approaches to value in deriving his opinion: the cost approach, income approach and comparable sales approach. [L.F. 65, 162, 217] He gave the greatest weight to the income approach and the least amount of weight to the cost approach. [L.F. 162] The witness' evidence on each of the approaches is discussed below.

Cost approach

A cost approach to value may consist of a reproduction cost approach or a replacement cost approach. [L.F. 140] The reproduction cost approach determines the

cost of constructing an exact duplicate of an improved property. [L.F. 140] This approach determines the construction costs using the same materials, construction standards, design layout and quality of workmanship and adjusts it for the elapsed time at current prices and adjusts those prices for the lapse of time between the date of construction and the date of valuation. [L.F. 140, 70] The replacement cost approach seeks to determine the cost of constructing a building with the same utility as the building being appraised but with modern materials and according to current standards, design and layout. [L.F. 140]

Overall, the cost approach is particularly applicable when the property is improved with relatively new improvements which conform to the highest and best use of the land or when the property is improved with relatively unique or specialized improvements for which there are no comparables in the market. [L.F. 132] Replacement cost is preferred for older properties when the construction techniques are outdated or when the property involves superadequate construction. [L.F. 140] Reproduction cost is the best indicator of value when actual costs of construction are available and the construction was relatively recent. [L.F. 140] With the Casino Aztar property, given its recent construction, the reproduction cost of the property would be the best indicator of value. [L.F. 70]

Notwithstanding the recent construction of the improvements and the witness' concession on cross-examination that reproduction cost was the best indicator of value, the witness applied the replacement cost approach to form his opinion of value by the cost approach. [L.F. 52, 140] There were two parts to applying the replacement cost

method: a determination of the cost of the improvements and a determination of the cost of the land on which the improvements were located. [L.F. 53, 59, 144]

The cost of the improvements was determined using replacement cost estimates from the Marshall Valuation Service guide. [L.F. 68, 140] The estimates were based on classifying the improvements as a Class C Country Club for purposes of determining the base cost. [L.F. 141] The total estimated replacement cost before adjustments was \$4,397,000, which was broken down into \$2,530,000 for the replacement cost of the main level of the Pavilion, \$867,000 for the replacement cost of the lower level of the Pavilion and \$1,000,000 for the site improvements consisting of the surface parking, gazebos, concrete walks, chain link fencing, light poles, etc. [L.F. 59, 141] Entrepreneurial profit and overhead were added to the total amount, to produce a new total of \$4,616,850. [L.F. 52, 142]

From this estimate, deductions were then made for depreciation. [L.F. 52] Total amount depreciation was \$3,600,000. [L.F. 59] The depreciation consisted of a 10% deduction from the cost of the building (\$356,685), based on an estimated economic life of the property of 50 years, and a 40% deduction from the cost of the site improvements based on an estimated economic life of 10 years (\$420,000). [L.F. 143-44] An additional deduction of 5% was taken for external obsolescence because the facility was located in a small community which depended on the local and traveling population (\$192,008). No deduction was made for functional obsolescence. [L.F. 143] Functional obsolescence is considered to be an item of superadequate or inadequate construction.

[L.F. 143] The subject did not suffer from functional obsolescence because it was designed and constructed for its current use. [L.F. 143]

The total estimated replacement cost for the improvements was \$3,648,157. [L.F. 144]

To this amount was added the value of the land. [L.F. 144] The land was valued by comparing it to sales of vacant land for similar real estate in the same area, if possible, and buttressing that information with additional market data outside the area but for similar uses. [L.F. 53] There were six sales used in this part of the analysis. [L.F. 134-36] Of the six, four were located in Pemiscot County; however, none of these were suitable or appropriate for casino property because they did not have river frontage. [L.F. 55] The various uses for which the properties were acquired and the per acre price were an office building at a price of \$79,710 per acre; a parking lot for a state office building at \$32,558 per acre; a gasoline station/convenience store at \$62,409 per acre; and a hotel at \$93,750 per acre. [L.F. 134-35] The last property was acquired to construct a hotel adjacent to the Casino Aztar. [L.F. 58, 135] The remaining two comparables were land acquired for use with other casino properties located in other parts of Missouri. [L.F. 136] The land acquired for the Harrah's and Players casino facility in Maryland Heights had a unit price of \$85,404 per acre. The land acquired in connection with the casino in St. Joseph was at a unit price of \$13,316 per acre. [L.F. 136] These sales occurred between May 23, 1993, and March 16, 1998. [L.F. 134-36] The witness did not consider Casino Aztar's purchase of the subject property in October, 1994. [L.F. 53] Even though the witness thought it could have been important to use the sale of the subject and it was

sometimes true that the sale of the subject would be the best indicator of value, he believed he had sufficient information from the market to support his opinion of value and he could not confirm the information on the sale of the property to the degree he believed was sufficient to rely on it. [L.F. 54]

Based on the comparables he used, the witness was of the opinion that the unit price for the subject property was \$50,000 per acre. [L.F. 58, 139] He principally relied on the first four comparables which were located in Pemiscot County and buttressed his opinion by consideration of the two comparables located elsewhere. [L.F. 56] The cost of the land was \$1,880,000. [L.F. 144] This was further broken down into a cost of \$140,000 for 2.75 acres the witness classified as primary land, [L.F. 57, 115, 144,] and \$1,740,000 for the remaining 34.75 acres classified as excess land. [L.F. 57, 115, 144] The primary land was that land which would be required to support the improvements if they were segregated on a stand alone basis, and did not include river frontage. [L.F. 57]

The final estimate of value based on the replacement cost was \$5,530,000. [L.F. 144]

Income approach

The income approach is based on the principle of anticipation and attempts to set value by estimating the present worth of what a person would receive as an income stream from the property. [L.F. 59-60] It is most appropriate in valuing investment-type properties and is reliable when rental income, operating expenses, and capitalization rates can be estimated from adequate indices of existing market conditions. [L.F. 162] The

first step in applying the income approach is to find comparable rentals and make adjustments. [L.F. 60, 61-62]

The subject property is not a rental property but is owner occupied and was designed to meet the needs of Casino Aztar. [L.F. 145] In fact, casinos are not rental properties, so the income approach for Casino Aztar's gaming facility was based on alternate uses. [L.F. 62, 73] The property is also somewhat unique in that it combines three uses into one building – office, retail and storage. [L.F. 145]

The witness considered six rental properties as comparables. [L.F. 146-50] None of the six were casino facilities. [L.F. 60] The comparable rentals used consisted of: (1) 14,070 square feet, four-tenant strip mall located in Cape Girardeau with an average rental of \$14.24 per square foot; (2) 32,002 square foot outlot retail center occupied by three tenants located in Cape Girardeau with an average rental of \$12.19 per square foot; (3) 178,000 square feet, 41 tenant shopping center located in Springfield with rental rates varying from \$9.00 to \$13.00 per square foot; (4) 157,425 square feet shopping mall located in Springfield with an average rental of \$7.16 per square foot; (5) 120,000 square feet 62 tenant shopping center in Springfield with rental rates from \$7.50 to \$10.50 per square foot; and (6) 70,000 square feet 22 tenant retail center in Springfield with a rental rate of \$10.00 per square foot. [L.F. 146-148]

Based on these comparables, and giving primary consideration to the first two, the witness believed that the subject property would rent for \$12.00 per square foot, with gross potential revenue of \$480,000. [L.F. 150] The gross potential revenue was reduced by a vacancy/collection loss factor and a factor for management fees and reserves for

replacement. [L.F. 150-51] The net operating income was \$406,880. [L.F. 151] The net operating income was then divided by a capitalization rate of 11.0%. [L.F. 152] In determining the appropriate capitalization rate, the witness looked to acceptable capitalization rates for strip shopping centers. [L.F. 151-52] An effective tax rate was then added to the direct capitalization rate to produce an adjusted capitalization rate of 12.5%. [L.F. 153]

Applying the adjusted capitalization rate to the net operating income produced an estimated value for the improvements and 2.75 acres of “primary land” of \$3,255,040. [L.F. 153] To this was added the value of the “excess land,” i.e. \$1,740,000. [L.F. 153] The total opinion of value by the income approach was \$4,995,040. [L.F. 154]

Comparable sales approach

The comparable sales approach takes prices paid for similar properties in arms length transactions, makes adjustments for differences, and comes up with a value for the subject property by applying the adjusted price to the subject. [L.F. 131] It is meaningful as an indicator of value when there is an active market with sufficient data available to make a comparative analysis. [L.F. 131, 155] Its reliability varies directly with the quantity and quality of available data. [L.F. 131]

The Casino Aztar property was a unique one-of-a-kind property, with the result that there were no sales of properties similar to the subject property in the market. [L.F. 155, 160] In addition, there was a lack of demonstrative market evidence to support the adjustments made to the comparable properties. [L.F. 160] Given the absence of similar

sales in the market, the subject was compared to sales of retail strip centers and other uses. [L.F. 155-58, 160]

The six comparables used included a one-story office building located in Caruthersville, a grocery store located in Caruthersville, a strip shopping center located in Caruthersville, two shopping centers located in Springfield, and a retail center located in Columbia. [L.F. 156-58] Based on the comparables, a gross square foot value of \$80.00 per square foot was estimated to be appropriate for the subject property. [L.F. 161] The value of the improvements on the 2.75 acres of primary land was \$3,200,000. Total opinion of value by the comparable sales approach was \$4,940,000, when the value of the excess land was added to the improvements. [L.F. 161]

Personal Property Assessment

Only two items of personal property owned by Aztar Missouri Gaming are at issue in this appeal. [L.F. 358] These are the riverboat M/V City of Caruthersville, used by Aztar Missouri Gaming as its casino, and the wharf barge Scott, which was used as a loading platform for the riverboat casino. [L.F. 358] Aztar Missouri Gaming did not dispute the assessed value of any other items of personal property owned by it. [L.F. 358]

M/V City of Caruthersville

The assessor determined that the M/V City of Caruthersville had a fair market value as of January 1, 1999, of \$9,317,397. [L.F. 604] This amount was based on a replacement cost of \$11,225,779.50, with \$1,908,382.50 subtracted for depreciation. [L.F. 604]

The City of Caruthersville was originally designed and constructed as an excursion boat. [L.F. 418] Aztar Missouri Gaming purchased the vessel in 1994 for a price of \$7,308,296.61, [L.F. 300] and extensively renovated to be put into its present service as a casino boat, the costs of renovation being approximately \$5 million. [L.F. 419, 420] The total acquisition cost – purchase price plus costs of renovation – was \$11,921,233. [L.F. 300] The boat has approximately 9,700 square feet and 697 gaming positions, including 493 slot machines. [L.F. 421] Gaming is conducted on three levels of the vessel. [L.F. 420] The boat was put into service on May 1, 1995. [L.F. 300] The vessel was in good condition and, while not large by gaming boat standards, it was well-suited for the Caruthersville gaming market. [L.F. 583] From 1995 until 1999, the City of Caruthersville conducted gaming cruises on the Mississippi. [L.F. 419] In 1999, the vessel became permanently docked and gaming operations were conducted on the boat dockside. [L.F. 419]

Other than Commission exhibit 1, [L.F. 604], the only evidence of value was the appraisal report and testimony of Aztar Missouri Gaming’s appraiser. [L.F. 353 – 604] There were three methodologies for appraising vessels: the cost approach, income approach and market value approach. [L.F. 424, 578] The appraiser only used the sales comparison approach in his appraisal of the City of Caruthersville. [L.F. 378, 416] The replacement cost and income approaches were excluded. [L.F. 378, 416] The appraiser testified that he was instructed to conduct only a comparable sales approach, referred to as a “market value.” [L.F. 378-79] The appraisal report also indicated that it was the appraisers’ understanding that he was only to conduct a market value approach for the

vessel. [L.F. 417, 424] However, he was not instructed to exclude the other two approaches. [L.F. 371-72] The appraisal report also indicated that the cost approach was excluded because it would produce the illusion of a high market value due to the high cost of producing a comparable vessel, [L.F. 416], and the income approach was excluded because income is linked to the gaming license which cannot be transferred along with the vessel. [L.F. 392, 416]

Using the comparable sales approach, the appraiser derived an opinion of value for the City of Caruthersville of \$617,740. [L.F. 416] This was based on a highest and best use of the vessel as a floating casino. [L.F. 423, 584] The conclusion on highest and best use was based on the inability to economically convert the City of Caruthersville to a boat utilized for excursions. [L.F. 423]

Under a sales comparison approach, and pursuant to the standards of the Uniform Standard of Professional Appraisal Practice, a value is derived by considering the price paid for similar properties and making adjustments to those prices based on the differences between the subject properties and the comparable sales. [L.F. 581, 424] The appraiser did not follow this methodology in valuing the City of Caruthersville, however. [L.F. 387, 424-28] The appraiser reviewed the three most recent sales of vessels of which he was aware. [L.F. 424] From the information on these three sales, the appraiser determined aggregate averages for three categories: cost per square foot of gaming area; cost per square foot of total area; and cost per gaming position. [L.F. 387, 426] These amounts were:

	Vessel 1	Vessel 2	Vessel 3	Average
Cost/sq. ft. gaming area	\$69.27	\$50.00	Unknown	\$59.635
Cost/sq. ft. total area	\$46.71	\$17.14	\$48.21	\$37.35
Cost/gaming position	\$1,750	\$857.14	Unknown	\$1,303.57

[L.F. 426] These averages were then applied to the City of Caruthersville:

Cost/sq. ft gaming area

$\$59.635 \times 9,740 \text{ sq. ft} = \$580,844.90$

Cost/sq. ft. total area

$\$37.35 \times 9,740 \text{ sq. ft.} = \$363,789.00$

Cost/gaming position

$\$1,303.57 \times 697 \text{ positions} = \$908,588.29$

[L.F. 387, 428] The values derived from applying the averages from the comparable sales to the characteristics of the City of Caruthersville were themselves averaged to come up with a market value of \$617,740. [L.F. 428]

Barge Scott

The assessor determined that the barge Scott had a fair market value of \$4,397,712. [L.F. 604] This amount was based on a replacement cost of \$5,298,448.74, with \$900,736.74 subtracted for depreciation. [L.F. 604]

The barge Scott was built around 1960 and originally used as a single skin tank barge. [L.F. 410, 419] It was acquired by Aztar Missouri Gaming in 1994 and converted to a casino support and passenger loading barge for the M/V City of Caruthersville. [L.F. 419] Aztar Missouri Gaming's appraiser was unfamiliar with the price paid by Aztar

Missouri Gaming for the barge, [L.F. 368], but the total cost of the barge plus improvements was \$11,360,229.70. [L.F. 300-01] As with the M/V City of Caruthersville, the Scott was placed into service on May 1, 1995. [L.F. 300-01] The conversion of the Scott included construction of a two-story structure on the barge which covered the entire length and width of the barge. [L.F. 419] The second floor included public areas for passenger ticketing and queuing for entry onto the City of Caruthersville. [L.F. 419, 421] It also included a small snack area and a public restroom. [L.F. 421] The lower level was improved into numerous office and casino support areas. [L.F. 419, 421]

In addition to these improvements, on the relevant valuation date of January 1, 1999, the Scott was also in the process of being renovated to serve as a floating casino for Aztar Missouri Gaming, although the appraiser did not know how far advanced the improvements were. [L.F. 419] The Scott opened as a casino on July 4, 1999. [L.F. 365-66, 419, 588] The appraiser did not know the size of the Scott but estimated it at less than 20,000 square feet. [L.F. 398] He also did not know the number of gaming positions it would support. [L.F. 398]

The highest and best use for the Scott was as a casino boat support barge or for conversion to offices for a fleeting operation or an excursion boat. [L.F. 365, 378, 415] The Scott could be converted to a casino boat. [L.F. 365] However, its potential use as a casino barge was not considered in determining its highest and best use or in valuing the barge. [L.F. 378, 415] However, the potential a boat had for future alteration would bear on its value. [L.F. 380]

There would be a limited market for the Scott. There were lots of barges on the market, [L.F. 369], and someone desiring an improved barge like the Scott would just as easily buy another raw barge on the market and convert it. [L.F. 371-72] It was not in the pool of barges someone would buy for use on the river, such as for transport of liquids. [L.F. 397] Even if it were within this pool of barges for general maritime use, it would not be purchased for such a use because tank barges purchased for the hull are readily available on the market for less than \$100,000 from a number of sources. [L.F. 422, 590] In addition, someone looking for a casino boat would not buy the Scott in its condition as a casino support barge, opting instead to buy a raw barge and improve it or to build a barge directly in the moat. [L.F. 396-97]

Aztar Missouri Gaming's appraiser did not rely on any of the three recognized approaches to value in deriving his opinion of value for the Scott. [L.F. 367] He was requested only to do a sales comparison approach, referred to as a "market value," for the Scott. [L.F. 370] He was unable to give an opinion using the comparable sales approach because there were no sales in the marketplace of barges similar to the Scott. [L.F. 367-68, 375] Besides being asked only to value the Scott by the comparable sales approach, the appraiser did not use the income approach because the income generated by a barge in the casino field is tied to the license. [L.F. 368] He also did not use the cost approach because he believed the barge was beyond its useful life. [L.F. 368]

It would have been possible to value the Scott by the cost approach. [L.F. 370] This would have been done by determining the price for a raw barge similar to the Scott in the marketplace and then adding the cost of the improvements to the barge. [L.F. 370,

373-74] As an alternative to buying a raw barge in the market, the cost approach could also be computed by determining the cost of building both a new barge and adding the necessary improvements. [L.F. 373-74] Once the costs of the raw barge and improvements are determined, deductions are then made for depreciation. [L.F. 374]

The appraiser valued the Scott at \$125,000, although not by any of the recognized approaches to value. [L.F. 367] This was based on his general knowledge of the marine equipment market. [L.F. 428]

POINTS RELIED ON

I.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE REAL PROPERTY ASSESSMENT BY THE ASSESSOR AND SETTING A NEW VALUE FOR CASINO AZTAR'S PROPERTY BECAUSE THE VALUE SET BY THE STATE TAX COMMISSION DOES NOT REPRESENT THE TRUE VALUE IN MONEY OF THE PROPERTY IN THAT IT VALUED THE PROPERTY AT A USE OTHER THAN ITS HIGHEST AND BEST USE.

City of St. Louis v. Union Quarry & Construction Co., 394 S.W.2d 300 (Mo. 1965)

Aspenhof Corporation v. State Tax Commission, 789 S.W.2d 867 (Mo. Ct. App. 1990)

Delaware Racing Association v. McMahon, 340 A.2d 837 (Del. 1975)

McGraw-Edison Co. v. Washington County Board of Assessment Appeals, 573

A.2d 248 (Common. Ct. Pa. 1990)

II.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE REAL PROPERTY ASSESSMENT BY THE ASSESSOR AND SETTING A NEW VALUE FOR CASINO AZTAR'S PROPERTY BECAUSE THE TAXPAYER FAILED TO OVERCOME THE PRESUMPTION OF THE VALIDITY OF THE ASSESSMENT OR TO ESTABLISH THE CORRECT TRUE VALUE IN MONEY BY SUBSTANTIAL AND COMPETENT EVIDENCE AND/OR THE COMMISSION'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE IN THAT THE EVIDENCE SHOWED THAT THE

ACCEPTED APPROACHES TO VALUE WERE NOT PROPERLY APPLIED OR SHOULD NOT HAVE BEEN APPLIED, THAT ALL FACTORS AFFECTING VALUE WERE NOT CONSIDERED AND THAT OTHER IMPROPER FACTORS WERE CONSIDERED.

Aspenhof Corp. v. State Tax Commission, 789 S.W.2d 867 (Mo. Ct. App. 1990)

Drey v. State Tax Commission, 345 S.W.2d 228 (Mo. 1961)

State ex rel. Missouri Highway and Transportation Commission v. Union Realty and Securities Co., 827 S.W.2d 768 (Mo. Ct. App. 1992)

Stephen and Stephen Properties, Inc. v. State Tax Commission, 499 S.W.2d 798 (Mo. 1973)

III.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE PERSONAL PROPERTY ASSESSMENT BY THE ASSESSOR AND SETTING A NEW VALUE FOR AZTAR MISSOURI GAMING'S PROPERTY BECAUSE THE TAXPAYER FAILED TO OVERCOME THE PRESUMPTION OF THE VALIDITY OF THE ASSESSMENT OR TO ESTABLISH THE CORRECT TRUE VALUE IN MONEY BY SUBSTANTIAL EVIDENCE AND/OR THE COMMISSION'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THE TAXPAYER'S EVIDENCE OF VALUE DID NOT APPLY ANY RECOGNIZED METHOD OF VALUE BUT INVOLVED, INSTEAD A METHOD DEVISED BY HIM, THE ACCEPTED APPROACHES TO VALUE WERE NOT PROPERLY APPLIED OR SHOULD NOT HAVE BEEN APPLIED,

THAT ALL FACTORS AFFECTING VALUE WERE NOT CONSIDERED AND THAT OTHER IMPROPER FACTORS WERE CONSIDERED.

Quincy Soybean Co. v. Lowe, 773 S.W.2d 503 (Mo. Ct. App. 1989)

Aspenhof Corp. v. State Tax Commission, 789 S.W.2d 867 (Mo. Ct. App. 1990)

Drey v. State Tax Commission, 345 S.W.2d 228 (Mo. 1961)

IV.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE REAL PROPERTY ASSESSMENT AND SETTING A NEW VALUE FOR CASINO AZTAR'S PROPERTY BECAUSE ITS VALUATION APPROACH WAS IN VIOLATION OF ARTICLE X, SECTION 10(b) OF THE MISSOURI CONSTITUTION IN THAT CASINO PROPERTIES ARE TREATED DIFFERENTLY IN THEIR VALUATION FROM OTHER COMMERCIAL SUBCLASS PROPERTIES BY BEING APPRAISED AT AN ALTERNATE, LESS ECONOMIC HIGHEST AND BEST USE.

MO. CONST. Art. III, § 4(b)

Drey v. State Tax Commission, 345 S.W.2d 236 (Mo. 1961)

Florida Department of Revenue v. Howard, 859 So.2d 619 (Fla. Ct. App. 2003)

Aspenhof Corp. v. State Tax Commission, 789 S.W.2d 867 (Mo. Ct. App. 1990)

ARGUMENT

I.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE REAL PROPERTY ASSESSMENT BY THE ASSESSOR AND SETTING A NEW VALUE FOR CASINO AZTAR'S PROPERTY BECAUSE THE VALUE SET BY THE STATE TAX COMMISSION DOES NOT REPRESENT THE TRUE VALUE IN MONEY OF THE PROPERTY IN THAT IT VALUED THE PROPERTY AT A USE OTHER THAN ITS HIGHEST AND BEST USE.

Standard of review. In an appeal of the circuit court's judgment on judicial review of an agency decision, the Court reviews the action of the agency, not the circuit court. *Hermel, Inc. v. State Tax Commission*, 564 S.W.2d 888, 894 (Mo. banc 1978). The court may inquire into whether the action of the agency is in violation of constitutional provisions; in excess of the statutory authority or jurisdiction of the agency; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law for any other reason; is made upon unlawful procedure or without a fair trial; is arbitrary, capricious or is unreasonable; or involves an abuse of discretion. §536.140.2, RSMo. Generally, on review, the evidence is considered in a light most favorable to the agency, together with all favorable inferences. *Hermel*, 564 S.W.2d at 888. If the evidence would support either of two opposed findings, the Court is bound by the agency's determination. *Id.* However, if the Commission's decision involves a question of law, the court reviews the question independently. *Aspenhof Corporation v. State Tax Commission*, 789 S.W.2d 867, 868 (Mo. Ct. App. 1990). In addition, if the

action of the agency being reviewed involves only the application by the agency of the law to the facts, the court may weigh the evidence for itself and determine the facts accordingly. §536.140.3, RSMo. Whether the proper standards of value were properly applied under the particular facts and circumstances of the case is a question of law. *City of St. Louis v. Union Quarry & Construction Co.*, 394 S.W.2d 300, 303 (Mo. 1965); *Stephen and Stephen Properties, Inc. v. State Tax Commission*, 499 S.W.2d 798, 802 (Mo. 1973).

In reviewing an assessment, the Court must also bear in mind that a taxpayer challenging an assessment has a dual burden. The first burden that a taxpayer must overcome is to present substantial evidence showing that the assessment was excessive. *Hermel, Inc.*, 564 S.W.2d at 895. Substantial evidence is evidence which, if true, would have probative force on the issues and from which the trier-of-fact can reasonably decide the case on the fact issues. *Id.* Having met this burden, the taxpayer also bears the burden of proof in establishing the correct value which should have been placed on the property. *Cupples Hesse Corp. v. State Tax Commission*, 329 S.W.2d 696, 702 (Mo. 1959).

Argument. The flaw in the decision of the Commission is that it ignores one of the principal rules of valuation for tax assessment purposes, i.e., a property's fair market value (true value in money) can only be determined by valuing the property at its highest and best use. Valuing it in any other way undervalues (and even more precisely with respect to casino properties, grossly undervalues) the property. Yet, the State Tax Commission has accepted the premise advanced by Casino Aztar that this rule will not

apply to casino properties in Missouri. The rule adopted for casinos is that they will not be valued at the highest and best use as a casino but will be valued at their next most profitable commercial use. The end result is an undervaluation of those properties for, as recognized in *City of Atlantic City v. Boardwalk Regency Corp.*, values of properties which cannot be used for casino purposes are lower than the values of properties where casinos are permitted. 19 N.J. Tax 164, 179 (Sup. Ct. N.J. App. Div. 2000).

Important for this case, the evidence was undisputed that the highest and best use for Casino Aztar's property was as it is currently developed and utilized – a gaming casino. [L.F. 51, 63, 65, 78, 99, 129, 219] This was Casino Aztar's own evidence on the highest and best use. In other words, Casino Aztar was not contending that the property had some other highest and best use and the Commission was not faced the circumstance of deciding between two contrary factual positions by the parties on highest and best use. Similarly, in the absence of any dispute over the highest and best use, and in light of the undisputed evidence that the highest and best use was as a casino, the Commission itself determined that the highest and best use was as currently developed. [L.F. 269] Having accepted the factual positions of the parties as to highest and best use, however, the Commission went on to craft, contrary to Missouri law, a new legal rule for the valuation of casinos. They are to be valued according to "the next most profitable commercial activity." [L.F. 269]

Both Article X, Section 4(b) of the Missouri Constitution and section 137.115, require that real property in Missouri be taxed at its value, or as stated in section 137.115.1, its "true value in money." MO. CONST. Art. X, § 4(b); §137.115, RSMo.

2000.¹ True value in money is the same as fair market value. *Equitable Life Assurance Society v. State Tax Commission*, 852 S.W.2d 376, 380 (Mo. Ct. App. 1993); *Quincy Soybean Co. v. Lowe*, 773 S.W.2d 503, 504 (Mo. Ct. App. 1989). “Fair market value typically is defined as the price which the property would bring when offered for sale by a willing seller who is not obligated to sell, and purchased by a willing buyer who is not compelled to buy.” *St. Joe Mineral Corp. v. State Tax Commission*, 854 S.W.2d 526, 529 (Mo. Ct. App. 1993). *Accord Equitable Life Assurance*, 852 S.W.2d at 380.

True value in money (or fair market value) is further defined and determined by reference to the price which the property would bring when devoted to its highest and best use. *Equitable Life Assurance*, 852 S.W.2d at 380. As was said in *Aspenhof Corp. v. State Tax Commission*, “True value in money is the fair market value of the property on the valuation date and is a function of its highest and best use, which is the use of the property which will produce the greatest return in the reasonably near future.” 789 S.W.2d 867, 869 (Mo. Ct. App. 1990)(emphasis added)(citation omitted).

As the Court noted almost forty years ago, a determination of true value in money cannot ignore the property’s highest and best use and attempt to value the property at a lesser economic use of the property. *City of St. Louis v. Union Quarry & Construction Co.*, 394 S.W.2d 300, 304-05, 306-07 (Mo. 1965)(condemnation case). In that case, the highest and best use of the property was its then-current use as an income-producing

¹ Unless noted otherwise, all references to Missouri Statutes of Missouri are to RSMo. 2000.

landfill. *Id.* at 305. The valuation, however, was based on a different highest and best use as an abandoned quarry which might be converted into residential development. As the Court stated, “It would not be fair or proper to fix the value as an abandoned quarry, because it is being operated in another capacity, as an income-producing venture of another kind. This increases its market value, and is a factor to be considered.” *Id.* at 306.

The same rule was stated and the same result reached in a Delaware property tax assessment case involving a gaming-related property, i.e. a race track. *Delaware Racing Association v. McMahon*, 340 A.2d 837, 840-41 (Del. 1975). In *Delaware Racing Association*, the taxpayer’s valuation witness valued the racetrack based on a highest and best use as a planned unit development, rather than the gaming use for which it had been built and was being operated. The court rejected the notion that the property could be valued for some lesser economic use than its highest and best use as a racetrack, referring to that lesser economic use as “some speculative, imaginary use created in the mind of an expert.” *Id.* at 840-41. Supporting the court’s decision was evidence that the racetrack was not readily adaptable to the speculative, imaginary use of the taxpayer’s witness and that there were ongoing improvements to the property in support of its use as a racetrack. *Id.*

The case before the Court is indistinguishable from the *Union Quarry* and *Delaware Racing Association* cases. Casino Aztar’s witness was very adamant that the highest and best use of the property was as a gaming facility. [L.F. 51, 99, 129, 219] As he noted in his report, the property was specifically designed for its use as a gaming

casino and was well-suited to its purpose. [L.F. 102, 122, 124, 143, 145] In addition, he concluded that it would not be economically feasible to convert it to some other use, specifically stating, “Some of the development possibilities include hotels, mixed use, institutional, and retail. Although it is legally possible to use part of the property for such developments, we do not consider any of these uses to be financially feasible for several reasons.” [L.F. 126] The witness’ report concluded that there was no market for a hotel or office building. [L.F. 127] As he also stated:

The highest and best use, as improved, analyzes whether the improvements should remain as they are, be modified or converted to some other use, or be demolished for the residual value of the site. As shown in the Addenda, the estimated value of the land in fee is estimated at \$1,880,000 and is derived based on its highest and best use as a gaming facility. The market for land in the area is considered to be stable and there have been no major land sales in the subject neighborhood. As such, it appears that the building improvements provide a contributory value to the property. Therefore, demolition of the existing improvements does not appear to be feasible.

The remaining options for the building include modifying the building to single tenant use; the building could be utilized by an owner-user; or convert the building to an institutional facility. Conversion of the property is not considered to be maximally productive. As indicated in the Income Capitalization Approach, the existing property produces an income stream that indicates that the current improvements are providing a contributory value to the site. Therefore, the highest and best use of the subject property is as currently improved.

[L.F. 129] Notwithstanding this unqualified conclusion that the highest and best use of the property was for casino purposes, the witness ignored such a highest and best use in his application of the three approaches to value utilized by him. [L.F. 55, 58, 60, 134-35, 141, 146-48, 156-58]

As the Commission's decision shows, it is based on a highest and best use of what is described as "the next most profitable commercial activity." [L.F. 269] The problem with the Commission's decision on this point is principally in its error in concluding that valuing the property at its highest and best use as a gaming casino is somehow inextricably intertwined with the gaming license. As the decision states, "The Hearing Officer understands that as the property is currently developed with the gaming license, the highest and best use (most economically and legally permissible use) is, of course, the operation of a casino. Take away the gaming license and the subject property's highest and best use can no longer legally be for a casino." [L.F. 269] The hearing officer's apparent understanding of the gaming licensing process is that a potential gaming licensee goes into the Missouri Gaming Commission's office, picks up its license, and then goes about acquiring the land for its casino and beginning construction of its facility. *See, especially*, the discussion at L.F. 263 ("Without the existence of a casino license in Complainant it is highly unlikely that the subject land would have commanded a \$5.9 million purchase price in 1995, assuming that was in fact the land value. The casino license was clearly a critical factor relating to the purchase of the subject land and the price paid for same"). However, the record is very clear that Casino Aztar acquired the

property in October of 1994, [L.F. 171-80], and that the gaming facility was not licensed until July 1, 1995, when it opened for business. [L.F. 118]

What the Commission fails to see is that it is not the gaming license which gives the property its highest and best use. It is the demand for a gaming facility in the community and the physical attributes of the property which allow it to be developed to such a use, along with the potential that a gaming license could be obtained to operate such a facility on the particular property in question because the property's location meets the requirements of Article III, section 39(e) that a gaming facility be located in artificial spaces within 1,000 feet of the Mississippi or Missouri Rivers. MO. CONST. Art. III, § 39(e). These are precisely the type of factors which go into highest and best use as described by the Court when it stated that "the uses of the land for which it is reasonably adapted or suited may be considered, including a special adaptation to a particular use, having regard to the existing business wants of the community." *Union Quarry & Construction Co.*, 394 S.W.2d at 305 (citations omitted).

The Commission either misconstrues the concept of "value in use" or has improperly applied it. "Value in use is 'the ability of an asset to produce revenue through ownership.'" *Nordstrom, Inc. v. Maricopa County*, 88 P.3d 1165, 1171 (Ct. App. Ariz. 2004), *quoting Glossary for Property Appraisal and Assessment* 153 (1997). At no time has the Assessor sought to value the property as an Aztar casino, nor was her estimate of value based on the property in question being purchased lock-stock-and-barrel as the Aztar Casino continuing to operate under the Aztar name and Aztar gaming license.

Instead, she considered only what is the undisputed highest and best use for the property and valued the property according to that highest and best use.

McGraw-Edison Co. v. Washington County Board of Assessment Appeals, 573 A.2d 248 (Common. Ct. Pa. 1990), is instructive. There, as here, there was no dispute that the highest and best use of the property being appraised was its current use as developed. The fact that the appraiser “considered the highest and best use of the property to be its continued use by a single manufacturer, that is, someone who would use it in the same or similar capacity” as the present owner did not convert his valuation from a fair market value, value-in-exchange appraisal to a value-in-use appraisal. *Id.* at 444. Since the valuation was not based solely on the value of the property to the current owner but considered how the market would view the highest and best use for the property, it was not an impermissible value-in-use valuation. *Id.* In other words, as the Assessor has contended throughout these proceedings, value-in-exchange can only be determined by consideration of the highest and best use of the property. She has valued the property not according to what it is worth to Casino Aztar operating under its current license, but according to what a willing buyer viewing the property at its undisputed highest and best use and looking to put it to the same or similar use would pay.

What the Commission has done by demanding that the property be valued “as if it were to be utilized for the next most profitable commercial activity,” [L.F. 269] is to value the property as though it were to be sold at fire sale prices. The evidence established the highest and best use of the property as a gaming facility but the Commission wants to treat the issue of highest and best use and valuation as though

Casino Aztar is required to sell the property tomorrow for whoever is willing to take it. This is directly contrary to the accepted definition of fair market value “as the price which the property would bring when offered for sale by a willing buyer who is not obligated to sell, and purchased by a willing buyer who is not compelled to buy.” *St. Joe Minerals Corp.*, 854 S.W.2d at 529 (emphasis added).

II.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE REAL PROPERTY ASSESSMENT BY THE ASSESSOR AND SETTING A NEW VALUE FOR CASINO AZTAR’S PROPERTY BECAUSE THE TAXPAYER FAILED TO OVERCOME THE PRESUMPTION OF THE VALIDITY OF THE ASSESSMENT OR TO ESTABLISH THE CORRECT TRUE VALUE IN MONEY BY SUBSTANTIAL AND COMPETENT EVIDENCE AND/OR THE COMMISSION’S DECISION WAS NOT SUPPORTED BY SUBTANTIAL AND COMPETENT EVIDENCE IN THAT THE EVIDENCE SHOWED THAT THE ACCEPTED APPROACHES TO VALUE WERE NOT PROPERLY APPLIED OR SHOULD NOT HAVE BEEN APPLIED, THAT ALL FACTORS AFFECTING VALUE WERE NOT CONSIDERED AND THAT OTHER IMPROPER FACTORS WERE CONSIDERED.

Standard of review. The standard of review for the issues raised under this Point is the same as set out under Point I. That statement of the standard of review is incorporated by reference.

Argument. Both the recognized legal principals for application of the different approaches to valuation and the evidence presented by Casino Aztar point to a single conclusion – the real property (and for that matter, the personal property) should have been valued according to the reproduction cost approach to value. The property clearly met the requirements for a special use property and was consistently described as such by the undisputed evidence. [L.F. 62, 63, 68, 73, 76, 104, 124, 126-27, 155, 160] As Casino Aztar’s evidence continually showed, the comparable sales approach and the income approach were either inapplicable, given the type of property involved, or were only of marginal value in formulating an opinion of value for the property.

Casino Aztar’s valuation evidence was marked by: failures to properly apply the recognized approaches to value; applications of the approaches in a manner which was inconsistent with the methodology which Casino Aztar’s witness set out in his appraisal report or testimony; failures to properly consider factors that would impact the value on the property; and the consideration of other factors that were improper. In adopting the approaches of Casino Aztar’s appraisal witness, the Commission’s decision suffers from the same flaws.

The purpose of valuing a property for tax assessment purposes is to determine the true value in money of the property as of the relevant tax day. *Hermel, Inc. v. State Tax Commission*, 564 S.W.2d 888, 897 (Mo. banc 1978). Four different methods (or approaches) to deriving an estimate of value for tax assessment purposes have been recognized: the sales comparison approach (also known as the market data approach), the income approach, the replacement cost approach, and the cost of construction approach

(also known as the reproduction cost approach). *Aspenhof Corp. v. State Tax Commission*, 789 S.W.2d 867, 869 (Mo. Ct. App. 1990). In determining a tax assessment, while the Commission may have some latitude in determining which approach to valuation best estimates the value of a particular property, there is no authority for it to deviate from the proper and recognized application of any approach or approaches which it determines best estimates true value in money, it being said, “Once the Commission decides to use a particular method, it must consider all of that method’s factors in arriving at a valuation.” *Id.* In addition, questions of what is appropriately considered in the different methodologies and whether those methodologies have been correctly applied are questions of law, not fact. *See, e.g., Stephen and Stephen Properties, Inc. v. State Tax Commission*, 499 S.W.2d 798, 804 (Mo. 1973); *St. Louis County v. State Tax Commission*, 515 S.W.2d at 451; *State ex rel. Missouri Highway and Transportation Commission v. Union Realty and Securities Co.*, 827 S.W.2d 768, 770 (Mo. App. 1992)(only after comparable sales approach is determined to be properly applied is trier-of-fact then allowed to make factual determinations based on that approach).

As an initial matter, it is clear that the Commission’s decision is skewed by its erroneous determination that the Assessor in this case was advocating a value in use theory of valuation. [L.F. 261] The decision of the hearing officer adopted by the Commission states, “Respondent’s position as expressed in her written direct testimony advances a valuation based upon value in use. Even if Exhibit 1 has been received into evidence it would not have been relevant, nor substantial and persuasive evidence to

establish value. Casino property cannot be valued based on the income stream of the gaming business conducted on the premises.” [L.F. 261] Exhibit 1 referred to by the Commission’s decision nowhere mentions or suggests that Casino Aztar’s property should be valued according to the stream of income represented by the profits being generated by the gaming operations.² [L.F. 224-231] It appears that what the Commission is referring to in its decision is the Assessor’s comments that the property has to be valued at its highest and best use and that highest and best use considers the property’s current condition and the way it is being used. [L.F. 228] The Commission also ignored the evidence in Exhibit 1 that the Assessor’s value relied in part on a detailed balance sheet which Casino Aztar submitted, [L.F. 227], a document under which Casino Aztar valued its property not by considering the stream of casino profits generated but by the cost approach. [L.F. 231] Notwithstanding its appraisal witness’ testimony that the property had a value of a mere \$5 million on January 1, 1999, Casino Aztar was valuing that same land and improvements at \$11,501,240.57, on December 31, 1998. [L.F. 231] Finally, the Commission ignored the evidence contained in its own exhibit which similarly showed that the subject property was valued by a cost approach and not an

² Appellants understand that Exhibit 1 was not admitted into evidence, [L.F. 44], and for that reason have not referenced it in their statement of facts. However, because the Commission decision discussed the exhibit substantively, Appellants should not be precluded from addressing those comments by the Commission on the substance of the document.

income approach. [L.F. 236] The Commission fixated on the language “value in use” but failed to appreciate that there was no evidence to substantiate its conclusion that this was the method by which the Assessor had valued the property or that it was the valuation method being advanced by the Assessor in the appeal before the Commission. Indeed, it would appear from reading the Commission’s decision that the mantra of “value in use” is used repetitively as the justification for the Commission to ignore the legal flaws, inconsistencies and errors in Casino Aztar’s evidence of value.

Cost approach to value. Recognized methods for valuing property for tax assessment purposes includes the reproduction cost and replacement cost methods. *Aspenhof Corp.*, 789 S.W.2d at 869; *Quincy Soybean Co. v. Lowe*, 773 S.W.2d 503, 504 (Mo. Ct. App. 1989). As recognized by this Court in *Stephen and Stephen Properties, Inc. v. State Tax Commission*, the cost approach is particularly suited to valuing properties of a special use which are not actively sold in the marketplace. 499 S.W.2d 798 (Mo. 1973). *See, also, State ex rel. State Highway Commission v. Gebhardt*, 714 S.W.2d 558, 561 (Mo. Ct. App. 1986).

Ignoring both these legal principles and its own evidence, Casino Aztar relied principally on the income approach to value and gave only minor weight to the replacement cost approach it used. It rejected the reproduction approach out of hand even though its own evidence indicated that not only was that the proper cost approach to be applied but that it should have been the principal, if not sole, method for valuing the property.

In valuing Casino Aztar's property by the cost approach, its witness chose to apply the replacement cost method as opposed to the reproduction cost method. [L.F. 52, 140] The replacement cost approach is directed towards valuing property by the cost of constructing a building with the same utility as the building being appraised, but with modern materials and according to current standards, design and layout. [L.F. 140] In contrast, the reproduction cost method is directed towards valuing property by the cost of constructing identical improvements using the same materials, construction standards, design layout and quality of workmanship, with adjustments made for depreciation. [L.F. 70, 140] As the witness went on to explain, the replacement cost approach is appropriate when the building is older, the construction techniques are outdated, or the property involves superadequate construction. [L.F. 132] Reproduction cost is the best indicator of value when the construction is relatively recent and the actual costs of construction are available. [L.F. 70]

In adopting Casino Aztar's replacement cost approach, the Commission ignored the evidence that the improvements were less than four years old, not having been completed until sometime in 1995. [L.F. 118] The Commission also ignored the testimony of Casino Aztar's appraisal witness that the reproduction cost method would have been the best indicator of value for the subject property given its recent construction:

Q: Would not given its recent construction would not the historical cost be appropriate and be the best indicator of value for reproducing before you do any depreciation ?

A: If you wanted to get a reproduction estimate, that would be it. And, you could add the time adjustments to those numbers. And that's true.

[L.F. 70]

In addition to this evidence that Casino Aztar relied on the incorrect cost approach to value in determining its value, the Commission ignored Casino Aztar's evidence which established that the cost approach should have been given the most (if not, exclusive) weight in valuing the property. The appraisal report entered into evidence stated, "It [the cost approach] is particularly applicable when the property being appraised involves relatively new improvements which represent the highest and best use of the land, or when relatively unique or specialized improvements are located on the site for which there exist no comparable properties in the market." [L.F. 132] Having determined that the cost approach is most appropriate when either of these two conditions is met, Casino Aztar concluded this approach should be given the least amount of weight in the determination of value, [L.F. 162], in direct contrast to: (i) the recent acquisition of the property and construction of the improvements, [L.F. 118], (ii) the numerous conclusions of the appraisal witness that the improvements represented the highest and best use of the property, [L.F. 51, 99, 126-27, 129, 219], (iii) similar conclusions that the property was specifically designed for use as a gaming facility, [L.F. 102, 104, 122, 124, 126-27, 129, 143, 145], and (iv) continued references that the property constituted a special use property. [L.F. 62, 63, 68, 73, 76, 104, 124, 126-27, 155, 160]

The Commission's adoption of the cost approach of Casino Aztar for purposes of arriving at its final determination of value, is not supported by competent evidence, is arbitrary, capricious and unreasonable, and is an abuse of discretion.

Income approach to value. The Commission's decision on the income approach to value and Casino Aztar's evidence relating to that approach are similarly flawed. Casino Aztar's appraisal witness placed the greatest reliance on the income approach in determining his final opinion of value. [L.F. 162] As also shown under Point I, none of the rental comparables used by him to derive his opinion by the income approach were casino properties. [L.F. 60] In adopting Casino Aztar's income approach, the Commission stated the following:

It is clear from Mr. Dinan's appraisal report that in performing his income approach he properly considered the rental income stream that the subject property could command for a purpose other than a casino. There is no evidence that casino facilities are leased to casino operators. Mr. Dinan's testimony was that these facilities don't rent, they are owner occupied. [L.F. 267]

* * *

The use of retail "strip mall" type facilities to develop the income approach was appropriate, since in the opinion of the appraiser this would be the type of rental use to which the subject building and supporting improvements would most likely be put in the absence of the casino. [L.F. 268]

The fallacy of the Commission's decision is its determination that, under the income approach, if the type of property involved is not one for which rental comparables

are available in the marketplace, it is acceptable to determine a value through consideration of rental information on other, less economic uses. If there is an absence of comparables in the market on which to base an opinion, the solution is to reject the use of the particular approach, *see, e.g., State ex rel. Missouri Highway and Transportation Commission v. Union Realty and Securities Co.*, 827 S.W.2d 768, 770 (Mo. Ct. App. 1992), not to go down a list of lesser economic uses until comparables in the market are found.

Here, Casino Aztar's appraisal witness testified to the absence of rentals of casino properties. [L.F. 62, 73, 145] The Commission also accepted this factual determination. [L.F. 267] Any evidence of value based on the income approach is not substantial evidence. As a matter of law, any attempted valuation by this approach should have been rejected.

In addition, the evidence shows the inconsistency in Casino Aztar's reliance on the income approach. As its appraisal witness indicated in his report, the income approach is most appropriate in valuing investment-type property and is reliable when rental income, operating expenses and capitalization rates can be determined from adequate indices of existing market conditions. [L.F. 162] The undisputed evidence of that same witness that there is a total absence of rental income information relating to the type of property being appraised, [L.F. 62, 73, 145], establishes the unreliability of his opinion of value by the income approach, and the unreasonableness of the Commission in relying on that evidence in forming its decision.

Comparable sales approach. The comparable sales approach evidence in the record and the Commission's reliance on it suffers from the same flaws as exist with the income approach. The evidence established that the subject property was a unique property and that there were no sales of similar properties in the market to which the subject property could be compared. [L.F. 155, 160] At the same time, the appraisal report noted that the sales comparison approach was only meaningful as an indicator of value when there is an active market for the type of property involved with sufficient data available to make a comparative analysis and that its reliability corresponds directly to the quantity and quality of data available. [L.F. 131, 135] Instead of rejecting the sales comparison approach as inappropriate to derive an opinion of value for the subject property, the appraisal witness relied on comparables of properties involving lesser economic uses. [L.F. 156-58] Significantly, in adopting Casino Aztar's comparable sales approach in setting its value, the Commission did not determine that the office building, grocery store, strip retail centers and shopping centers used by the appraisal witness were comparable to a casino facility for purposes of valuing the subject property. [L.F. 268-69] Instead, its conclusion was that since there were no sales in the market from which a comparison could be made, the property could be valued using non-comparable properties that represented multiple, less economic uses. [L.F. 268-69]

“Comparable sales consist of evidence of sales reasonably related in time and distance and involve land comparable in character.” *Union Realty and Securities Co.*, 827 S.W.2d at 770. Clearly, the comparable sales did not meet this standard. Indeed,

both Casino Aztar's appraisal witness and the Commission agree that the sales were not comparable in character to a casino facility.

In addition, even if it was proper to consider the particular comparable sales involved, the appraisal witness' report indicated that there was no information in the market to support the adjustments made to the comparable sales. [L.F. 160] The Commission could not ignore this admission of a lack of support for the adjustments made by the appraisal witness and could not base its decision on this evidence. *Drey v. State Tax Commission*, 345 S.W.2d 228, 235 (Mo. 1961); *Aspenhof*, 789 S.W.2d at 869.

Summary. The Commission's decision is not supported by substantial evidence on the record when it relies on opinion evidence that improperly applies valuation approaches or fails to consider information which should have been considered under a particular valuation approach. *Drey*, 345 S.W.2d at 235 (Mo. 1961); *Aspenhof*, 789 S.W.2d at 869. Not one of the approaches used by Casino Aztar or the Commission constituted substantial evidence of the value of the subject properties because of the shortcomings in each.

III.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE PERSONAL PROPERTY ASSESSMENT BY THE ASSESSOR AND SETTING A NEW VALUE FOR AZTAR MISSOURI GAMING'S PROPERTY BECAUSE THE TAXPAYER FAILED TO OVERCOME THE PRESUMPTION OF THE VALIDITY OF THE ASSESSMENT OR TO ESTABLISH THE CORRECT TRUE VALUE IN MONEY BY SUBSTANTIAL

AND COMPETENT EVIDENCE AND/OR THE COMMISSION'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THE TAXPAYER'S EVIDENCE OF VALUE DID NOT APPLY ANY RECOGNIZED METHOD OF VALUE BUT INVOLVED, INSTEAD A METHOD DEVISED BY HIM, THE ACCEPTED APPROACHES TO VALUE WERE NOT PROPERLY APPLIED OR SHOULD NOT HAVE BEEN APPLIED, THAT ALL FACTORS AFFECTING VALUE WERE NOT CONSIDERED AND THAT OTHER IMPROPER FACTORS WERE CONSIDERED.

Standard of review. The standard of review for the issues raised under this Point is the same as set out under Point I. That statement of the standard of review is incorporated by reference.

Argument. As with real property, personal property is to be assessed with reference to its true value in money. *Quincy Soybean Co. v. Lowe*, 773 S.W.2d 503, 504 (Mo. Ct. App. 1989); *Bussmann Division of Cooper Industries/McGraw Hill v. State Tax Commission*, 802 S.W.2d 543, 545 (Mo. Ct. App. 1991). True value in money means the fair market value of the property. *Id.*

In this case, Aztar Missouri Gaming's appraisal evidence showed that neither the M/V City of Caruthersville nor the barge Scott were appraised by any recognized valuation method. With respect to the City of Caruthersville, while the appraisal witness labeled his methodology a market value approach, there was no attempt to make a comparison between the three most recent sales of which he was aware and the City of

Caruthersville. [L.F. 387, 424-28] Instead, the witness averaged the prices on the three sales according to different characteristics, applied those averages to the same characteristics of the City of Caruthersville, and then averaged again these second amounts. [L.F. 424-28] The method applied by the appraisal witness did not comport with the Uniform Standard of Professional Appraisal Practice (USPAP), the applicable appraisal standard, which required adjustments to be made based on the differences between the sales of similar property and the subject property. [L.F. 581, 424] Nowhere in the description of the USPAP standard does it approve of an average price methodology as the means for valuing personal property. In addition, the witness did not utilize either the replacement cost or income approach to value the City of Caruthersville. [L.F. 417, 424] With respect to the Scott, the appraisal witness admitted that he did not appraise the Scott by any recognized appraisal method, rejecting the comparable sales approach and understanding his assignment to be to not appraise the property by either a replacement cost or income approach. [L.F. 367]

This case is directly controlled by *Quincy Soybean Co.* As was held there, non-traditional methods of appraising are not substantial controverting evidence that will establish the amount of the assessment. 773 S.W.2d at 504-05. The particular method disapproved in *Quincy Soybean Co.* is strikingly similar to the method used by the appraisal witness in this case. It involved the creation of a point system for valuing grain elevators based on five comparables with the points applied to the characteristics of the property to derive a weighted value. *Id.* at 504. The system of Aztar Missouri Gaming's

appraisal witness which averaged averages is no different and cannot be considered substantial evidence for the same reason.

The Commission's acceptance of Aztar Missouri Gaming's value and valuation methodologies suffers from other deficiencies as well. As with the real property appeal of Casino Aztar, the Commission misconstrues the relationship of the gaming license to highest and best use of the property involved. As noted in that discussion, it is not the license which creates the highest and best use, although the potential for a license (much like the potential for a particular zoning classification) may be one of the factors in determining what the highest and best use for the property might be. The Commission's position on value in use and blind acceptance of the value and valuation methods of Aztar Missouri Gaming is particularly ironic as respects the valuation of the M/V City of Caruthersville. Aztar Missouri Gaming's appraisal witness himself relied on the number of gaming positions available as a means of valuing the gaming boat and noted that such a criteria would be particularly useful in deriving the value of such a vessel. [L.F. 424-28, 379, 380] Aztar Missouri Gaming's appraisal witness very clearly believed that valuing the vessel based on its potential for gaming did not involve lumping the value of the license in with the value of the boat. There was no evidence from which the Commission could make the determination it did on value in use.

The Commission's opinion is also flawed in its reliance on Aztar Missouri Gaming's valuation evidence because that evidence was intentionally limited to a single method of valuation and ignored the other accepted methods of valuation because of the appraiser's understanding that his assignment was to value the property solely by the

comparative sales approach. [L.F. 378-79, 417, 424] Thus, the evidence did not establish what the true value in money of the two vessels would have been. It only reflected what one of three of the accepted approaches to value indicated. The analysis of the value was very obviously incomplete.

Finally, with respect to the Scott, the Commission and Aztar Missouri Gaming were wrong to conclude that the highest and best use for this vessel was for some lesser economic use other than a floating casino. On the date of valuation, the Scott was already in the process of being converted to such a use. [L.F. 365-66, 419, 588] It was not coincidental that this conversion was taking place immediately following the passage of Article III, section 39(e) of the Missouri Constitution on November 3, 1998, authorizing gaming facilities to be located in artificial spaces within 1,000 feet of the Mississippi and Missouri Rivers. MO. CONST. Art. III, § 39(e). The appraisal witness even testified that its potential for future alteration would bear on its value. [L.F. 380] This notwithstanding, both the witness and the Commission ignored the reality of the ongoing conversion, the necessity for considering the potential alteration of the vessel in determining its value, and the change in Missouri law which legalized such a use.

Substantial evidence is required to establish the correct value in money which should be placed on the property. *Hermel*, 564 S.W.2d at 895. In addition, the Commission's decision is not supported by substantial evidence on the record when it relies on opinion evidence that improperly applies valuation approaches or fails to consider information which should have been considered under a particular valuation approach. *Drey*, 345 S.W.2d at 235 (Mo. 1961); *Aspenhof*, 789 S.W.2d at 869. The

valuation evidence in the record concerning the M/V City of Caruthersville and the Scott fail to satisfy either of these standards.

IV.

THE STATE TAX COMMISSION ERRED IN SETTING ASIDE THE REAL PROPERTY ASSESSMENT AND SETTING A NEW VALUE FOR CASINO AZTAR'S PROPERTY BECAUSE ITS VALUATION APPROACH WAS IN VIOLATION OF ARTICLE X, SECTION 10(b) OF THE MISSOURI CONSTITUTION IN THAT CASINO PROPERTIES ARE TREATED DIFFERENTLY IN THEIR VALUATION FROM OTHER COMMERCIAL SUBCLASS PROPERTIES BY BEING APPRAISED AT AN ALTERNATE, LESS ECONOMIC HIGHEST AND BEST USE.

Standard of review. The standard of review for the issues raised under this Point is the same as set out under Point I. That statement of the standard of review is incorporated by reference.

Argument. Should the Court determine that it was proper under section 137.115.1 for the Commission to value Casino Aztar's real property at a lesser highest and best use than a gaming facility, it is necessary to address whether such a practice is valid under Article X, section 4(b) of the Missouri Constitution. That provision of the Constitution provides, in pertinent part:

Property in classes 1 and 2 and subclasses of those classes, shall be assessed for tax purposes at its value or such percentage of value as may be fixed by law for each class

and subclass. . . . Property in class 1 shall be subclassed in the following classifications:

- (1) Residential property;
- (2) Agricultural and horticultural property;
- (3) Utility, industrial, commercial, railroad, and all other property not included in subclasses (1) and (2) of class 1.

Property in the subclasses of class 1 may be defined by law, however subclasses (1), (2), and (3) shall not be further divided. . . . The same percentage of value shall be applied to all properties within any subclass.

MO. CONST. Art. X, § 4(b). The “classes 1 and 2” referred to in this section are the classes of taxable property set out in the previous section of the Constitution. Class 1 property, which is applicable to this case, is real property. MO. CONST. Art. X, § 4(a). Thus, what Article X, section 4(b) provides is that the subclassification commercial real estate may not be further subdivided to create additional subclasses of that type of property.

Casino Aztar’s property is subclassified as commercial property for purposes of Article X, section 4(b). [L.F. 14, 17] Section 137.115.1, requires real property (regardless of the subclassification) to be valued according to its true value in money, although the different subclasses of property under Article X, section 4(b) are assessed at differing percentages of the true value in money of the property. §137.115.1, RSMo. Typically, “[t]rue value in money is the fair market value of the property on the valuation date and is a function of its highest and best use, which is the use of the property which

will produce the greatest return in the reasonably near future.” *Aspenhof Corp. v. State Tax Commission*, 789 S.W.2d 867, 869 (Mo. Ct. App. 1990). As set out in greater detail under Point I, what both Casino Aztar and the Commission did was to ignore that the highest and best use of Casino Aztar’s property was as a gaming facility and to value the property on a lesser economic highest and best use, referred to by the Commission as “the next most profitable commercial activity.” [L.F. 269] In essence, the Commission has created a separate rule or policy for valuing casino properties that not only accords it different treatment but values it at something less than the true value in money at which other properties in its subclassification are valued. In short, the Commission’s practice, creates a separate subdivision of the Article X, section 4(b) commercial subclassification.

As the Court pointed out in *Drey v. State Tax Commission*, 345 S.W.2d 228, 236-37 (Mo. 1961):

There are no subclassifications of real estate for purposes of taxation. All property is to be assessed ‘at its true value in money’ and all placed upon the same basis. An intentional plan or design of discrimination by which one kind or class of property is systematically assessed at a higher percentage of its value than other property in the county works a constructive fraud upon each property owner thus discriminated against. When not the result of mere error of judgment, and when intentional discrimination is established, the assessment cannot stand.

In determining that the assessment could not stand, the Court noted that “the evidence clearly reveals an implied approval, if not an adopted policy, on the part of the local

assessing authorities of subclassifying real estate in Shannon County for the purposes of taxation.” *Id.* at 236.

The Commission’s determination that casino properties are to be valued at something less than their highest and best use, while other properties in the same subclassification are valued at their highest and best use, is clearly an adopted policy of the Commission. That policy also clearly provides for a further subdivision of the commercial subclassification.

Florida Department of Revenue v. Howard, 859 So.2d 619 (Fla. Ct. App. 2003) is instructive on this issue, notwithstanding that it involved a challenge under Florida’s constitutional provision requiring uniform valuation methods. In that case a statutory scheme for assessing properties provided for additional or different methodologies unique to a limited class of properties. This is no different from the Commission’s approval of a methodology for valuing casino facilities which allows casino facility properties to be valued at a lesser highest and best use, while all other properties are valued at their highest and best use. The effect of the policy in Florida was to provide disparate and favored treatment to one class of property owners in contrast to other property owners. *Id.* at 621 n.3. Thus, the effect of the policy in Florida was to create a favored class separate and distinct from other classes of similarly situated taxpayers. The same result is achieved by the Commission’s treatment of Casino Aztar and other casino properties – casino properties become a separate and distinct subclass from all other properties in the commercial subclass established under Article X, section 4(b).

The appraisal rules the Commission has adopted for casino properties divides the commercial subclassification under Article X, section 4(b) into multiple subclasses of commercial property. This rule is in violation of that constitutional provision.

CONCLUSION

The judgment of the circuit court affirming the decisions of the State Tax Commission should be reversed and the cause remanded to the circuit court with directions that the circuit remand the case to the State Tax Commission to redetermination of the value of the subject properties for the taxable years in question consistent with this opinion.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 13,355 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 1/2" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

Thomas W. Rynard

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellants was sent U.S. Mail, postage prepaid, on this 13th day of September, 2004, to Thomas Caradonna, Lewis, Rice & Fingersh, LLC, 500 North Broadway, Suite 2000, St. Louis, MO 63102, and and Edward Reeves, Ward & Reeves, 711 Ward Avenue, P.O. Box 169, Caruthersville, Missouri 63830, Attorneys for Respondents.

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